

226006

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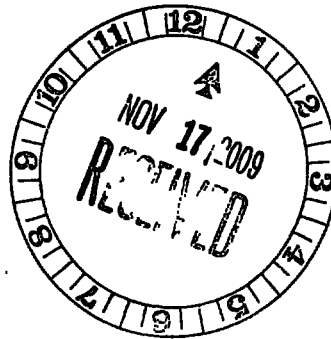
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November 17, 2009

VIA HAND DELIVERY

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423



Re: STB Finance Docket No. 35324, Teck Metals Ltd. – Petition for
Declaratory Order – Practices of Wheeling & Lake Erie Railway Co.

Dear Ms. Brown:

Enclosed for filing, please find an original and ten (10) copies of Teck Metals Ltd.'s Petition for Declaratory Order. Also enclosed is a check for the requisite filing fee in the amount of \$1,400.00.

An additional copy of the Petition is also enclosed. Kindly indicate receipt and filing of this Petition by time-stamping the extra copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

Respectfully submitted,

Stephanie M. Adams

An Attorney for Teck Metals Ltd.

ENTERED

NOV 17 2009

Part of
Public Record

Enclosures

cc: Counsel for Wheeling & Lake Erie Ry.

226006

BEFORE THE
SURFACE TRANSPORTATION BOARD



TECK METALS LTD. – PETITION
FOR DECLARATORY ORDER –
PRACTICES OF WHEELING &
LAKE ERIE RAILWAY COMPANY

Finance Docket No. 35324

TECK METALS LTD.'S PETITION FOR DECLARATORY ORDER

FILED

NOV 17 2009

**SURFACE
TRANSPORTATION BOARD**

Christine Deynaka
Counsel
Teck Metals Ltd.
Box 1000
Trail, B.C. V1R 4L8

**ENTERED
Office of Proceedings**

NOV 17 2009

**Part of
Public Record**

OF COUNSEL:

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Kelvin J. Dowd
Stephanie M. Adams
Slover & Loftus LLP
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Dated: November 17, 2009

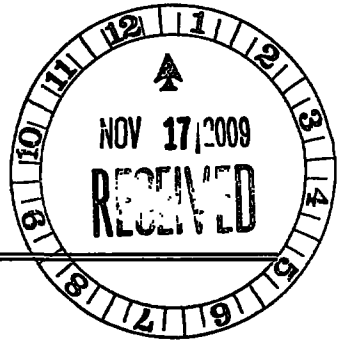
Attorneys & Practitioners

FEE RECEIVED

NOV 17 2009

**SURFACE
TRANSPORTATION BOARD**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**TECK METALS LTD. – PETITION
FOR DECLARATORY ORDER –
PRACTICES OF WHEELING &
LAKE ERIE RAILWAY COMPANY**

Finance Docket No. 35324

PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, and upon order of the U.S. District Court for the Northern District of Ohio, Teck Metals Ltd. hereby petitions the Surface Transportation Board for an order declaring that the Wheeling & Lake Erie Railway Company’s assessment of certain demurrage charges constitutes an unreasonable practice, in violation of 49 U.S.C. § 10702.

THE PARTIES

Petitioner Teck Metals Ltd. (f/k/a Teck Cominco Metals, Ltd., which together with Teck Metals Ltd. hereinafter is referred to as “Teck”) is a corporation organized under the Canadian Business Corporations Act, with its principal place of business in Vancouver, British Columbia, Canada. *Inter alia*, Teck is engaged in the processing and sale of zinc.

Respondent Wheeling & Lake Erie Railway Company (“WLE”) is both a contract and a common carrier by rail, and is subject, *inter alia*, to the provisions of Subtitle IV of Title 49 of the United States Code and to the jurisdiction of the Board.

WLE has provided common carrier service to Teck in the form of the delivery of carloads of zinc to Teck's customer and consignee, Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), at Martin's Ferry, Ohio.

FACTUAL BACKGROUND

This case arises from WLE's attempts to assess certain demurrage charges against Teck. WLE has claimed that, between June 2006 and December 2007 it held, short of delivery, certain carloads of zinc shipped by Teck as consignor to Wheeling Pitt as consignee at Martin's Ferry, Ohio. *See* Complaint ¶12.¹ WLE claimed that its Tariff No. 8001-B entitled it to assess demurrage against Teck for these alleged delays in delivery. *See* Complaint, Exhibit A. When Teck declined payment of the charges, *inter alia*, on the grounds that WLE had not attempted to assess such charges over the previous six (6) years under virtually identical transportation facts and circumstances, and that the charges were not applicable under the terms of WLE's tariff, WLE filed suit against Teck in the United States District Court for the Northern District of Ohio seeking \$369,960.00 allegedly due in demurrage charges. *See* Complaint ¶16.

On July 13, 2009, Teck filed an Answer and Counterclaim to WLE's Complaint, denying WLE's claims and asserting affirmative defenses based on laches, waiver, and estoppel. *See* Answer and Counterclaim at 1-4.² Teck also asserted a counterclaim that, under the relevant facts and circumstances, WLE's attempted assessment of certain demurrage charges against Teck constituted an unreasonable practice, in violation of 49 U.S.C. § 10702. *See* Answer and Counterclaim ¶22 - ¶32.

¹ A copy of WLE's Complaint is attached as Appendix 1.

² A copy of Teck's Answer and Counterclaim is attached as Appendix 2.

WLE filed a Response to Teck's Answer and Counterclaim where it generally denied the allegations in Teck's affirmative defenses and counterclaim. *See* Reply at 1-5. WLE also set forth eight affirmative defenses of its own. *See* Reply 5-6. A copy of WLE's Reply is attached as Appendix 3.

Teck subsequently filed with the Court a Motion for Referral to the Surface Transportation Board and For Stay Pending Referral. In an order entered on October 29, 2009 in *Wheeling & Lake Erie Ry. v. Teck Cominco Metals, Ltd.*, No. 5:09-CV-1184 (N.D. Ohio),³ United States District Judge John R. Adams granted Teck's Motion and, pursuant to the doctrine of primary jurisdiction, referred to the Board the issue whether WLE's assessment of certain demurrage charges upon Teck constituted an unreasonable practice.

REQUEST FOR RELIEF

Teck seeks an order from the Board addressing the reasonableness of WLE's practices in light of the factual circumstances of this case. Specifically, Teck seeks a Board determination that WLE's attempted assessment of certain demurrage charges against Teck constitutes an unreasonable practice in violation of 49 U.S.C. § 10702 where, *inter alia*, the corresponding bills of lading contained no special instructions from Teck, including no instructions to hold carloads prior to delivery; where historically WLE held carloads of zinc on its own line prior to delivery without attempting to assess demurrage charges against Teck; and where the governing WLE

³ A copy of the Court's order is attached as Appendix 4.

tariff required written notice of any deviation from the tariff for assessing demurrage, and no written notice was ever provided.

REQUEST FOR MODIFIED PROCEDURAL SCHEDULE

Teck requests that this proceeding be conducted pursuant to the Modified Procedure as provided in 49 C.F.R. Part 1112. Teck advises the Board that discovery has not yet commenced in this case, and requests that the Board's procedural schedule include sufficient time for discovery between the parties. In this regard, Teck proposes the adoption of the following procedural schedule:

- Day 1 - Board institutes declaratory order proceeding
- Day 90 - Discovery concludes
- Day 120 - Petitioner's Opening Statement due
- Day 150 - Respondent's Statement due
- Day 170 - Petitioner's Rebuttal Statement due

CONCLUSION

WHEREFORE, the Board should institute a declaratory order proceeding as requested and described in this Petition.


Respectfully submitted,

TECK METALS LTD.

By: Christine Deynaka
Counsel
Teck Metals Ltd.
Box 1000
Trail, B.C. V1R 4L8

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Kelvin J. Dowd 
Stephanie M. Adams
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1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: November 17, 2009

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of November, 2009, I served copies of Teck Metals Ltd.'s Petition for Declaratory Order by United States mail, first class postage prepaid on designated outside counsel for the Wheeling & Lake Erie Railway Company, as follows:

Thomas E. Dover
Gallagher Sharp - Cleveland
Sixth Floor – Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 241.5310
Fax: (216) 241.1608

James D. Helenhouse
Jeremy M. Berman
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Fletcher & Sippel
29 North Wacker Drive
Ste. 920
Chicago, IL 60606
Telephone: (312) 252.1500
Fax: (312) 252.2400


Stephanie M. Adams

APPENDIX 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

WHEELING & LAKE ERIE RAILWAY)	CASE NO.
COMPANY)	
Plaintiff)	JUDGE:
v.)	COMPLAINT
TECK COMINCO METALS, LTD.)	(Jury Demand Endorsed Hereon)
Defendant)	

NOW COMES Plaintiff, Wheeling & Lake Erie Railway Company ("WLE"), and for its Complaint against Defendant, Teck Cominco Metals Ltd. ("Teck") states as follows:

Parties

1. Plaintiff WLE is a Delaware Corporation whose principal place of business is in Brewster, Ohio. It operates as an interstate rail carrier subject to the jurisdiction of the United States Surface Transportation Board ("STB"), and operates a line of railroad between Toledo, Ohio and Wheeling, West Virginia.

2. Teck is a corporation organized under the Canadian Business Corporations Act, with its principal place of business in Vancouver, British Columbia, Canada. Teck is registered with the Ohio Secretary of State and maintains an agent for service of process in Cleveland, Ohio.

3. Jurisdiction in this matter is based upon (i) 28. U.S.C. § 1331, as some of WLE's claims arise under federal law; (ii) 28 U.S.C. § 1337; as some of WLE's claims arise under an Act of

Congress regulating commerce; and (iii) 28 U.S.C. § 1332, as WLE's claims are between a citizen of a State and a citizen of a foreign state and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

4. Venue properly lies in the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. § 1391(a)(2) and (b)(2) inasmuch as a substantial part of the events and omissions giving rise to the claim occurred within this jurisdictional district, and under 28 U.S.C. § 1391(a)(2) and (b)(2) as defendant is subject to jurisdiction in this district.

5. Since at least June 2006, Teck tendered to Canadian Pacific Railroad at Trail, British Columbia, Canada, under a uniform straight bill of lading showing Teck as the consignor and Wheeling Pittsburgh Steel Company ("Wheeling Pitt") as the consignee, carload shipments of zinc destined to Wheeling Pitt at Martin's Ferry, Ohio ("zinc carloads").

6. Pursuant to each bill of lading, the zinc carloads were transported by Canadian Pacific Railway ("Canadian Pacific" from Trail, British Columbia, Canada to Chicago, Illinois where Canadian Pacific interchanged the cars to Norfolk Southern Railway ("Norfolk Southern"). Norfolk Southern then transported the cars to Bellevue, Ohio where Norfolk Southern interchanged the cars to WLE. WLE then transported the zinc carloads to the destination at Martin's Ferry, Ohio.

7. As a common carrier by rail, WLE publishes tariffs which contain rules governing the rights and responsibilities of the carrier, consignee and consignor for shipments transported by WLE.

8. Pursuant to directions from Teck, WLE held the zinc carloads en route to Wheeling Pitt until Teck instructed WLE to release the zinc carloads for delivery to Wheeling Pitt. Pursuant to this arrangement, WLE held the zinc carloads at various locations along its rail lines between Bellevue and Martin's Ferry, Ohio. Teck released the zinc carloads allowing WLE to deliver them to Wheeling Pitt after Wheeling Pitt paid Teck for the Zinc.

9. While WLE held the zinc carloads, WLE's operations were constrained as it was unable to use its tracks and cars for other shipments. In some cases, Teck did not release zinc carloads for over six months.

10. Pursuant to 49 U.S.C. §§ 10702 and 10746, WLE has published a tariff establishing rules, procedures and demurrage charges when cars are delayed by the instructions of the consignor and held on WLE's tracks. Under WLE Tariff No. 8001-B, Item 535, attached hereto as Exhibit A, cars held on the order of consignor, while awaiting proper disposition from the consignor or as a result of conditions attributable to the consignor are subject to demurrage charges. The demurrage fee is \$60.00 per day under Tariff No. 8001-B, Item 540, Exhibit A.

11. By law, a carrier may assess demurrage charges against the consignor, consignee or both.

12. On or about each of the following dates, WLE began holding zinc cars at the request of Teck and the cars thus accrued demurrage charges: June 22, 2006; June 28, 2006; July 6, 2006; July 11, 2006; July 14, 2006; July 24, 2006; August 14, 2006; August 15, 2006; August 17, 2006; August 28, 2006; September 5, 2006; September 14, 2006; September 18, 2006; October 9, 2006; October 10, 2006; October 23, 2006; November 13, 2006; November 15, 2006; November 29, 2006; December 4, 2006; December 5, 2006; December 18, 2006; December 19, 2006; December 26, 2006; January 2, 2007; January 5, 2007; January 10, 2007; January 15, 2007; January 23, 2007; January 29, 2007; January 20, 2007; February 1, 2007; February 12, 2007; February 26, 2007; March 1, 2007; March 12, 2007; March 21, 2007; March 26, 2007; March 30, 2007; April 3, 2007; April 7, 2007; April 10, 2007; April 16, 2007; April 19, 2007; April 25, 2007; May 1, 2007; May 15, 2007; May 18, 2007; May 22, 2007; June 4, 2007; June 11, 2007; June 13, 2007; June 18, 2007; June 27, 2007; July 2, 2007; July 10, 2007; July 23, 2007; August 7, 2007; August 30, 2007; September 4, 2007; September 10, 2007; September 13, 2007; September 18, 2007; September 28, 2007; October

8, 2007; October 9, 2007; October 15, 2007; October 22, 2007; October 23, 2007; October 29, 2007; November 7, 2007; November 13, 2007; November 19, 2007; November 29, 2007; December 6, 2007; December 10, 2007; December 26, 2007;

13. WLE billed Teck for these demurrage charges.

14. There are currently 18 unpaid and past due demurrage bills owed by Teck totaling \$369,960.00, exclusive of interest and penalties. A summary of those bills is attached hereto as Exhibit B.

COUNT I - DEMURRAGE CHARGES

15. Plaintiff incorporates and reasserts the allegations contained in Paragraphs 1-14.

16. Teck, as consignor, and as a consequence of failing to release the cars, has incurred, and WLE is entitled to, at least \$369,960.00 in charges.

WHEREFORE, WLE prays that this Court enter judgment in Wheeling & Lake Erie Railway Company's favor on Count I, and order Teck to pay WLE an amount in excess of \$369,960.00 for demurrage charges, plus interest, and award fees and costs and such other relief as the Court deems appropriate.

COUNT II - QUANTUM MERUIT/UNJUST ENRICHMENT

17. Plaintiff incorporates and reasserts the allegations contained in Paragraphs 1-14 as though fully set forth herein.

18. At Teck's request, WLE held at least 230 cars.

19. WLE must pay car hire, which is an amount charged by the owner of a rail car for use of the car, for every hour that a rail car is on WLE's line.

20. WLE's holding of the cars was a benefit to Teck in that, *inter alia*, Teck received storage and it allowed Teck to use leverage to make Wheeling Pitt pay.

21. It would be unjust for Teck not to compensate WLE for the storage of the cars for, *inter alia*, the following reasons:

- a. Holding the cars created congestion on WLE's line and increased WLE's expenses.
- b. WLE incurred car hire charges in excess of \$100,000.

Wherefore, WLE prays that this Court enter judgment in Wheeling & Lake Erie Railway Company's favor on Count II, and order Teck to pay WLE an amount in excess of \$369,960.00, plus interest, for the benefit it provided to Teck and award fees, costs and such other relief as the Court deems appropriate.

DATED: May 22, 2009

Respectfully submitted,

s/Thomas E. Dover
THOMAS E. DOVER (0016765)
GALLAGHER SHARP
Sixth Floor-Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Phone: 216-241-5310
Fax: 216-241-1608
e-mail: tdover@gallaghersharp.com

(Signatures continued)

By: s/James Helenhouse

JAMES HELENHOUSE

WILLIAM SIPPEL

JEREMY BERMAN

FLETCHER & SIPPEL LLC

29 N. Wacker, Suite 920

Chicago, Illinois 60606

Phone: 312-252-1500

Facsimile: 312-252-2400

Attorneys for Plaintiff

WE 8001-B WHEELING & LAKE ERIE RAILWAY COMPANY Original Part 2-12		
PART 2 - SECTION 1		
CAR DEMURRAGE RULES AND CHARGES		
APPLICATION	SUBJECT	ITEM
<p>Applicable to cars held:</p> <p>A. On orders of consignor or consignee.</p> <p>B. While awaiting proper disposition from the consignor or consignee.</p> <p>C. As a result of conditions attributable to consignor or consignee.</p> <p>Disposition: That information, including forwarding instructions or empty release, which allows the railroad to either tender or release the car from the consignor's or consignee's account.</p> <p>Tender: The notification, actual or constructive placement of a loaded car.</p> <p>Release: Date and time that the railroad receives advice that the car is empty, or that forwarding instructions are received.</p> <p>Computation: Time will be computed from the first 0001 hours:</p> <p>A. After tender until release, on cars:</p> <ol style="list-style-type: none"> 1. Diverted. 2. Empty for loading - ordered and not used (other than a rejected car). 3. Partially unloaded. 4. Reconsigned. 5. Reshipped. 6. Stopped in transit. <p>B. After cars are received by WE until date of disposition on:</p> <p>(Item 535 continued next page)</p>	PRIVATE AND RAILROAD CARS HELD FOR OTHER PURPOSES, TRANSACTIONS, ETC.	535
For explanation of abbreviations and reference marks, see last page of Tariff		
ISSUED: December 6, 2004		EFFECTIVE: February 1, 2005

ISSUED BY:

Charlene Flack, Director Marketing Services
 Wheeling & Lake Erie Railway Company
 100 East First Street
 Brewster, Ohio 44613

EXHIBIT

A

WE 8001-B WHEELING & LAKE ERIE RAILWAY COMPANY Original Part 2-13		
PART 2 - SECTION 1		
CAR DEMURRAGE RULES AND CHARGES		
APPLICATION	SUBJECT	ITEM
Computation: (cont.) tracks. 1. Cars received from connecting carriers. 2. Loaded private cars returned to railroad tracks. C. After tender until date of refusal on: 1. Refused loaded cars or overloaded cars (consignee). D. After tender until date of disposition on: 1. Refused loaded cars or overloaded cars (consignor). E. After tender until release or placement on private tracks on: 1. Loaded private cars - while held on railroad tracks. Credits: A. One (1) credit will be allowed for each car released or on which disposition is given. B. Credits will not be allowed for: 1. Empty cars ordered and not used. 2. Loaded private cars returned to railroad tracks to be held for disposition. 3. Cars received from connecting carriers to be held for disposition.	PRIVATE AND RAILROAD CARS HELD FOR OTHER PURPOSES, TRANSACTIONS, ETC	535 (concluded)
A. Settlement of charges will be made on a monthly basis on all cars released during each calendar month. B. Credits earned and demurrage days accrued by customers having facilities at separate stations cannot be combined. C. Credits earned and demurrage days accrued will be calculated separately for the following: 1. Cars held for loading transactions. 2. Cars held for complete unloading transactions. 3. Private and railroad cars held for other purposes. (Item 540 continued next page)	DEMURRAGE PLAN AND CHARGES	540
For explanation of abbreviations and reference marks, see last page of Tariff		
ISSUED: December 6, 2004		EFFECTIVE: February 1, 2005

ISSUED BY:

Charlene Flack, Director Marketing Services
 Wheeling & Lake Erie Railway Company
 100 East First Street
 Brewster, Ohio 44613

WE 8001-B WHEELING & LAKE ERIE RAILWAY COMPANY Original Part 2-14		
PART 2 - SECTION 1		
CAR DEMURRAGE RULES AND CHARGES		
APPLICATION	SUBJECT	ITEM
<p>D. Excess credits earned for one transaction cannot be used to offset demurrage days on another transaction.</p> <p>E. Excess credits earned in one calendar month may not be used to offset demurrage days in another calendar month.</p> <p>F. Unless otherwise advised, in writing, demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment.</p> <p>G. Calculation of charges:</p> <ol style="list-style-type: none"> 1. Total demurrage days for all cars released will be added. 2. Total credits for all cars released will be added. 3. If total credits exceed total demurrage days, demurrage charges will not be assessed. 4. If total demurrage days exceed the total credits, calculation of charges will be made as follows: <ol style="list-style-type: none"> a. Subtract number of total credits from total demurrage days to determine chargeable days. b. The number of chargeable days will be assessed \$60.00 per day for railroad-owned equipment. 	DEMURRAGE PLAN AND CHARGES	540 (concluded)
<p>A. Charges will be billed on a monthly basis, for all cars released during each calendar month.</p> <p>B. Charges will be assessed against the consignee at destination on cars waiting placement or the consignor at origin on cars waiting forwarding instructions.</p> <p>C. Two (2) free days are given on each loaded car being held for consignee on constructive placement. No free time is allowed for consignor for loaded cars held on WE tracks awaiting forwarding instructions.</p> <p>D. Chargeable demurrage rate is \$35.00 per day.</p>	DEMURRAGE PLAN AND CHARGES FOR PRIVATE/SHIPPER-OWNED CARS	541
For explanation of abbreviations and reference marks, see last page of Tariff		
ISSUED: December 6, 2004		EFFECTIVE: February 1, 2005

ISSUED BY:
Charlene Flack, Director Marketing Services
Wheeling & Lake Erie Railway Company
100 East First Street
Brewster, Ohio 44613

WHEELING & LAKE ERIE RAILWAY CO
 MISCELLANEOUS ACCOUNT RECEIVABLE STATEMENT FOR TEC01

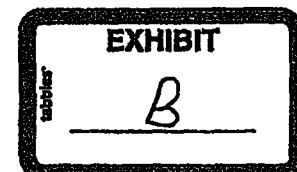
PAGE: 1
 AS OF 5/01/08

TECK COMINCO
 SUZANNE LOWE
 200 BURNARD ST SUITE
 VANCOUVER BC V6C 3

Bill Number	Type	FB Date	Amount
086 0 01738 015	DEMURRAGE	8/21/06	\$11,220.00
096 0 02006 015	DEMURRAGE	9/25/06	\$8,100.00
106 0 01198 015	DEMURRAGE	10/17/06	\$4,560.00
126 0 00994 015	DEMURRAGE	12/18/06	\$10,440.00
017 0 01267 015	DEMURRAGE	1/19/07	\$15,120.00
027 0 01332 015	DEMURRAGE	2/20/07	\$26,940.00
037 0 01949 015	DEMURRAGE	3/22/07	\$28,740.00
047 0 01504 015	DEMURRAGE	4/23/07	\$18,120.00
057 0 00917 015	DEMURRAGE	5/11/07	\$8,700.00
067 0 02132 015	DEMURRAGE	6/21/07	\$17,220.00
077 0 01530 015	DEMURRAGE	7/20/07	\$23,820.00
087 0 01524 015	DEMURRAGE	8/20/07	\$24,840.00
097 0 01119 015	DEMURRAGE	9/14/07	\$34,260.00
107 0 02174 015	DEMURRAGE	10/22/07	\$26,580.00
117 0 01885 015	DEMURRAGE	11/21/07	\$32,160.00
127 0 01483 015	DEMURRAGE	12/19/07	\$12,720.00
028 0 02454 015	DEMURRAGE	2/19/08	\$24,360.00
038 0 01619 015	DEMURRAGE	3/19/08	\$42,060.00
CUSTOMER TOTAL			\$369,960.00

JODI SMITH
 MANAGER CUSTOMER ACCOUNTING
 330-767-7258 phone
 330-767-7010 fax

REMITTANCE ADDRESS
 WHEELING & LAKE ERIE RAILWAY
 1986 PAYSPIRE CIRCLE
 CHICAGO, IL 60674



JS 44 (Rev 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Wheeling & Lake Erie Railway Company

(b) County of Residence of First Listed Plaintiff Stark
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Thomas E. Dover, GALLAGHER SHARP, 1501 Euclid Ave.
6th Floor-Bulkeley Bldg., Cleveland, OH 44115 (216) 241-5310

DEFENDANTS

Tack Cominco Metals, Ltd.

County of Residence of First Listed Defendant Vancouver, British Columbia
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Unknown

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|---------------------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input checked="" type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans' Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC Section 1332

Brief description of cause:
to recover demurrage costs.**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$
 UNDER F.R.C.P. 23 369,960.00

CHECK YES only if demanded in complaint.
 JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

05/22/2009

SIGNATURE OF ATTORNEY OF RECORD

Thomas E. Dover

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

I. Civil Categories: (Please check one category only).

1. ☒ General Civil
2. ☐ Administrative Review/Social Security
3. ☐ Habeas Corpus Death Penalty

*If under Title 28, §2255, name the SENTENCING JUDGE: _____

CASE NUMBER: _____

II. **RELATED OR REFILED CASES.** See LR 3.1 which provides in pertinent part: "If an action is filed or removed to this Court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regard for the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention of the Court by responding to the questions included on the Civil Cover Sheet."

This action is ☐ RELATED to another PENDING civil case. This action is ☐ REFILED pursuant to LR 3.1.

If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.

III. In accordance with Local Civil Rule 3.8, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested.

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

(1) **Resident defendant.** If the defendant resides in a county within this district, please set forth the name of such county

COUNTY:

Corporation For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.

(2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action arose or the event complained of occurred.

COUNTY:

(3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principle place of business within the district, and the cause of action arose or the event complained of occurred outside this district, please set forth the county of the plaintiff's residence.

COUNTY: Stark County

IV. The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section III, please check the appropriate division.

EASTERN DIVISION

- ☒ AKRON
☒ CLEVELAND
☐ YOUNGSTOWN

(Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas and Wayne)

(Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake,
Lorain, Medina and Richland)

(Counties: Columbiana, Mahoning and Trumbull)

WESTERN DIVISION

- ☐ TOLEDO

(Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry,
Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca
VanWert, Williams, Wood and Wyandot)

AO 440 (Rev. 04/08) Civil Summons

UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

WHEELING & LAKE ERIE RAILWAY COMPANY

Plaintiff

v.

TECK COMINCO METALS LTD.

Defendant

Civil Action No.

Summons in a Civil Action

To: *(Defendant's name and address)*

CT CORPORATION SYSTEM
REG. AGENT FOR TECK COMINCO METALS LTD.
1300 EAST NINTH STREET
CLEVELAND, OHIO 44114

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Thomas Dover
Gallagher Sharp
Seventh Floor, Bulkley Building, 1501 Euclid Avenue
Cleveland, Ohio 44115

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

(1) personally delivering a copy of each to the individual at this place, _____;
_____; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____; or

(4) returning the summons unexecuted to the court clerk on _____; or

(5) other (*specify*) _____

_____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

Date: _____

Server's signature

Printed name and title

Server's address

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WHEELING & LAKE ERIE RAILWAY
COMPANY,

Plaintiff,

v.

TECK COMINCO METALS, LTD.,

Defendant.

: CASE NO. 5:09-CV-1184

:

: JUDGE JOHN R. ADAMS

:

: **DEFENDANT TECK COMINCO**
: **METALS, LTD.'S ANSWER AND**
: **COUNTERCLAIM**

:

Teck Metals Ltd. ("Teck") hereby answers Plaintiff Wheeling & Lake Erie Railway Company's ("WLE") Complaint in this matter, as follows:

Parties

1. On information and belief, Teck admits the averments in Paragraph 1 of the Complaint.
2. In answer to Paragraph 2 of the Complaint, Teck states that on or about June 1, 2009, the corporate name of Teck Cominco Metals Ltd., the named Defendant in the Complaint, was changed to Teck Metals Ltd. No changes in the corporate structure of Teck Cominco Metals Ltd. material to the matters raised in the Complaint were made, and Teck is successor in interest to the named Defendant. As used herein, "Teck" shall refer both to Teck and its predecessor in interest. Subject to the foregoing, Teck admits the averments in Paragraph 2 of the Complaint.
3. Paragraph 3 of the Complaint asserts a legal conclusion regarding jurisdiction, to which no answer is required.
4. Paragraph 4 of the Complaint asserts a legal conclusion regarding venue, to which no answer is required.
5. Teck admits the averments in Paragraph 5 of the Complaint.

6. Teck admits the averments in Paragraph 6 of the Complaint.

7. Teck admits that as a common carrier by rail subject to the jurisdiction of the Surface Transportation Board ("STB"), WLE published tariffs applicable to its rail services. Teck denies the remaining averments in Paragraph 7, because the rights and responsibilities of WLE, the consignor and consignee are not governed solely by the terms of WLE's tariffs.

8. Teck denies the averments in Paragraph 8 of the Complaint.

9. Teck is without sufficient information to form a belief as to the truth of the averments in the first sentence of Paragraph 9 of the Complaint, and therefore denies same. Teck denies the averments in the second sentence of Paragraph 9 of the Complaint.

10. Teck admits that WLE has published a tariff denominated as WLE Tariff No. 8001-B. The remaining averments in the first sentence of Paragraph 10 of the Complaint assert legal conclusions to which no answer is required. In further answer to Paragraph 10 of the Complaint, Teck states that WLE Tariff No. 8001-B is a document which speaks for itself.

11. The averments in Paragraph 11 of the Complaint assert a legal conclusion to which no answer is required.

12. Teck denies that WLE began holding zinc cars after June 2006 at the request of Teck. Teck is without information sufficient to form a belief as to the truth of the remaining averments in Paragraph 12 of the Complaint, and therefore denies same.

13. In answer to Paragraph 13 of the Complaint, Teck admits that WLE attempted to bill Teck for demurrage charges in the amounts shown in Exhibit B to the Complaint.

14. Teck denies the averments in the first sentence of Paragraph 14 of the Complaint, because the referenced demurrage bills and amounts are not owed by Teck. The averments in the second sentence of Paragraph 14 of the Complaint relate to a document, which speaks for itself.

Count I - Demurrage Charges

15. Teck avers that no answer is necessary to the statement in Paragraph 15 of the Complaint.

16. Teck denies the averments in Paragraph 16 of the Complaint.

Prayer for Relief Count I

WHEREFORE, WLE should take nothing by Count I of its Complaint, the same should be dismissed with prejudice, Teck should be awarded all costs herein, and the Court should grant such other and further relief as the Court may deem just and equitable.

Count II - Quantum Meruit/Unjust Enrichment

17. Teck avers that no answer is necessary to the statement in Paragraph 17 of the Complaint.

18. Teck denies the averments in Paragraph 18 of the Complaint.

19. Teck is without information sufficient to form a belief as to the truth of the averments in Paragraph 19 of the Complaint, and therefore denies same.

20. Teck denies the averments in Paragraph 20 of the Complaint.

21. Teck denies the averments in Paragraph 21 of the Complaint.

Prayer for Relief on Count II

WHEREFORE, WLE should take nothing by Count II of its Complaint, the same should be dismissed with prejudice, Teck should be awarded all costs herein, and the Court should grant such other and further relief as the Court may deem just and equitable.

AFFIRMATIVE DEFENSES

First Affirmative Defense

WLE's claims against Teck are barred by the doctrine of preemption. The STB has primary jurisdiction over the reasonableness and lawfulness of WLE's practices, including

specifically its attempt to assess demurrage charges against Teck under the facts and circumstances relevant to this matter. The Court should refer all issues concerning the reasonableness and lawfulness of WLE's assessment of demurrage charges against Teck to the STB, and should stay all proceedings in this Court pending the resolution of same by the STB.

Second Affirmative Defense

WLE's claims against Teck are barred because its attempted assessment of demurrage charges against Teck constitutes an unreasonable practice by a common carrier railroad, in violation of 49 U.S.C. § 10702.

Third Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of laches.

Fourth Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of waiver.

Fifth Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of estoppel.

COUNTERCLAIM

Defendant Teck complains against WLE as follows:

22. Teck incorporates by reference Paragraphs 1 through 21 of its Answer to WLE's Complaint.

Jurisdiction, Venue and Parties

23. The Court has jurisdiction over this action under 28 U.S.C. § 1331 and 49 U.S.C. §§ 11704 (b) and 11705 (b).

24. Venue is proper in this division under 28 U.S.C. § 1391 (b) and (c).

25. Teck is a corporation organized under the Canadian Business Corporations Act, with its principal place of business in Vancouver, British Columbia, Canada. Inter alia, Teck is

engaged in the processing and sale of zinc, including sales to entities located in the United States and in the State of Ohio.

26. WLE is both a contract and a common carrier by rail, and is subject, inter alia, to the provisions of Subtitle IV of Title 49 of the United States Code, and to the jurisdiction of the STB. WLE has provided common carrier service to Teck in the form of the delivery of carloads of zinc to Teck's customer, Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), at Martin's Ferry, Ohio.

Facts

27. Commencing approximately in April, 2003, Teck tendered carloads of zinc at Trail, British Columbia for transportation to Wheeling Pitt at Martin's Ferry, Ohio, under standard bills of lading which designated Teck as consignor and Wheeling Pitt as consignee. Delivery of the zinc was to be made by WLE. The bills of lading contained no special instructions from Teck, including, in particular, no instructions to hold carloads prior to delivery. Such shipments continued to be made at least through December, 2007 .

28. On information and belief, on numerous occasions between the commencement of shipments and June, 2006, carloads of zinc were held by WLE on its own lines prior to delivery to Martin's Ferry. During this time period, WLE did not attempt to assess demurrage charges against Teck in connection with the subject shipments. On information and belief, WLE did not attempt to assess demurrage charges against Wheeling Pitt in connection with the subject shipments.

29. Paragraph 10 of WLE's Complaint asserts that WLE Tariff No. 8001-B, attached as Exhibit A to the Complaint, governs the assessment of demurrage charges by WLE. Item 540F of said tariff provides as follows:

Unless otherwise advised, in writing, demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment.

At no time did WLE advise Teck in writing that it would assess demurrage charges other than as provided in Item 540F.

30. On information and belief, commencing approximately in August 2006, WLE attempted to assess against Wheeling Pitt the demurrage charges that are summarized in Exhibit B to WLE's Complaint, and Wheeling Pitt declined to pay such charges.

31. WLE's attempted assessment of demurrage charges against Teck as described in Paragraphs 12 and 13 of the Complaint is an unreasonable practice, in violation of 49 U.S.C. § 10702.

32. Pursuant to 49 U.S.C. §§ 10704 (a)(1) and 11701 (a), the STB has the authority to determine the reasonableness and lawfulness of WLE's practices, including its attempted assessment of demurrage charges against Teck, and only the STB has the authority to order WLE to cease an unreasonable practice and prescribe substitute, reasonable practices.

WHEREFORE, Teck prays that the Court enter judgment:

(A) Declaring that the STB has exclusive or, in the alternative, primary jurisdiction to determine the reasonableness and lawfulness of WLE's attempted assessment of demurrage charges against Teck;

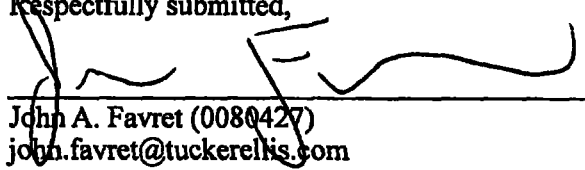
(B) Referring the question of the reasonableness of WLE's practice to the STB;

(C) Staying the instant litigation pending the outcome of the STB's determinations under 49 U.S. C. §§ 10702 and 10704(a)(1);

(D) Upon a determination by the STB that WLE's attempted assessment of demurrage charges against Teck was an unreasonable practice in violation of 49 U.S.C. § 10702, entering an order dismissing WLE's Complaint, with prejudice; and

(E) Granting Teck such other and further relief as the Court may deem just and equitable.

Respectfully submitted,



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john.favret@tuckerellis.com
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1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
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Facsimile: 216.592.5009

and

OF COUNSEL:
(Pro Hac Vice Motion to Be Filed)

Kelvin J. Dowd (D.C. Bar No. 358195)
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202.347.3619 (fax)
kjd@sloverandloftus.com

*Attorneys for Defendant Teck Cominco Metals,
Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2009, a copy of the foregoing **DEFENDANT TECK COMINCO METALS, LTD.'S ANSWER AND COUNTERCLAIM** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.



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*Attorneys for Defendant Teck Cominco Metals,
Ltd.*

APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WHEELING & LAKE ERIE RAILWAY
COMPANY,

Plaintiff,

vs.

TECK COMINCO METALS LTD.,

Defendant.

No. 5:09-CV-1184

JUDGE JOHN R. ADAMS

**PLAINTIFF'S RESPONSE TO AFFIRMATIVE DEFENSES AND
ANSWER TO COUNTERCLAIM**

NOW COMES Plaintiff Wheeling & Lake Erie Railway Company ("W&LE"), by and through its attorney, and in response to the Affirmative Defenses and Counterclaim of Defendant Teck Cominco Metal, Ltd. ("Teck"), states as follows:

AFFIRMATIVE DEFENSES

First Affirmative Defense

WLE's claims against Teck are barred by the doctrine of preemption. The STB has primary jurisdiction over the reasonableness and lawfulness of WLE's practices, including specifically its attempt to assess demurrage charges against Teck under the facts and circumstances relevant to this matter. The Court should refer all issues concerning the reasonableness and lawfulness of WLE's assessment of demurrage charges against Teck to the STB, and should stay all proceedings in this Court pending the resolution of same by the STB.

RESPONSE: W&LE denies all factual allegations of Teck's First Affirmative Defense. To the extent that legal conclusions are asserted, no response is required.

Second Affirmative Defense

WLE's claims against Teck are barred because of its attempted assessment of demurrage charges against Teck constitutes an unreasonable practice by a common carrier railroad, in violation of 49 U.S.C. §10702.

RESPONSE: W&LE denies all factual allegations of Teck's Second Affirmative Defense. To the extent that legal conclusions are asserted, no response is required.

Third Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of laches.

RESPONSE: W&LE denies all factual allegations of Teck's First Affirmative Defense. To the extent that legal conclusions are asserted, no response is required.

Fourth Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of waiver.

RESPONSE: W&LE denies all factual allegations of Teck's First Affirmative Defense. To the extent that legal conclusions are asserted, no response is required.

Fifth Affirmative Defense

WLE's claims against Teck are barred, in whole or in part, by the doctrine of estoppel.

RESPONSE: W&LE denies all factual allegations of Teck's First Affirmative Defense. To the extent that legal conclusions are asserted, no response is required.

ANSWER TO COUNTERCLAIM

22. Teck incorporates by referenced Paragraphs 1 through 21 of its Answer to WLE's Complaint.

RESPONSE: W&LE incorporates by reference paragraphs 1-21 of W&LE's Complaint, and denies all factual allegations or legal conclusions in Teck's Answer that are inconsistent with W&LE's allegations.

Jurisdiction, Venue and Parties

23. The court has jurisdiction over this action under 28 U.S.C. §1331 and 49 U.S.C. §§11704(b) and 11705(b).

RESPONSE: W&LE admits only that jurisdiction is proper under 28 U.S.C. §1331, but denies the remaining allegations of ¶23.

24. Venue is proper in this division under 28 U.S.C. §1331 (b) and (c).

RESPONSE: Admitted.

25. Teck is a corporation organized under the Canadian Business Corporations Act, with its principal place of business in Vancouver, British Columbia, Canada. Inter alia, Teck is engaged in the processing and sale of zinc, including sales to entities located in the United States and in the State of Ohio.

RESPONSE: Admitted.

26. WLE is both a contract and a common carrier by rail, and is subject, inter alia, to the provisions of Subtitle IV of Title 49 of the United States Code, and to the jurisdiction of the STB. WLE has provided common carrier service to Teck in the form of the delivery of carloads of zinc to Teck's customer, Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), at Martin's Ferry, Ohio.

RESPONSE: W&LE admits only that it is a common carrier by rail, subject to regulation by the STB and the second sentence of ¶26. W&LE denies the remaining allegations of ¶26.

Facts

27. Commencing approximately in April, 2003, Teck tendered carloads of zinc at Trail, British Columbia for transportation to Wheeling Pitt at Martin's Ferry, Ohio, under standard bills of lading which designated Teck as consignor and Wheeling Pitt as consignee. Delivery of the zinc was to be made by WLE. The bills of lading contained no special instructions from Teck, including, in particular, no instructions to hold carloads prior to delivery. Such shipments continued to be made at least through December, 2007.

RESPONSE: Admitted

28. On information and belief, on numerous occasions between the commencement of shipments and June, 2006, carloads of zinc were held by WLE on its own lines prior to delivery to Martin's Ferry. During this time period, WLE did not attempt to assess demurrage charges against Teck in connection with the subject shipments. On information and belief, WLE did not attempt to assess demurrage charges against Wheeling Pitt in connection with the subject shipments.

RESPONSE: W&LE admits only that it did not attempt to collect demurrage charges on every shipment, and denies the remaining allegations of ¶28.

29. Paragraph 10 of WLE's Complaint asserts that WLE Tariff No. 8001-B, attached as Exhibit A to the Complaint, governs the assessment of demurrage charges by WLE. Item 540F of said tariff provides as follows:

Unless otherwise advised, in writing, demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment.

At no time did WLE advise Teck in writing that it would assess demurrage charges other than as provided in Item 540F.

RESPONSE: W&LE admits that 540F is accurately quoted, but denies its applicability. Teck denies the remaining allegations of Paragraph 29. In further answering, Item 535, the course of dealing between Teck, Wheeling Pitt, and W&LE, and correspondence provided notice that Teck could be assessed demurrage charges.

30. On information and belief, commencing approximately in August 2006, WLE attempted to assess against Wheeling Pitt the demurrage charges that are summarized in Exhibit B to WLE's Complaint, and Wheeling Pitt declined to pay such charges.

RESPONSE: Admitted

31. WLE's attempted assessment of demurrage charges against Teck as described in Paragraphs 12 and 13 of the Complaint is an unreasonable practice, in violation of 49 U.S.C. §10702.

RESPONSE: Denied

32. Pursuant to 49 U.S.C. §§10704(a)(1) and 11701(a), the STB has the authority to determine the reasonableness and lawfulness of WLE's practices, including its attempted assessment of demurrage charges against Teck, and only the STB has the authority to order WLE to cease an unreasonable practice and prescribe substitute, reasonable practices.

RESPONSE: Denied

AFFIRMATIVE DEFENSES

1. Teck's claims should be barred under the doctrine of unclean hands.
2. Teck's claim should be dismissed because it fails to state a claim for which relief can be granted and is a redundant affirmative defense as further set forth in W&LE's Motion to Dismiss and/or Strike.
3. Teck's claims are barred by the statute of limitations.
4. Teck's claims are barred under the doctrine of laches.

5. Teck's claims are barred under the doctrine of estoppel.
6. Teck's claims are barred under the doctrine of waiver as it has admitted that it owes such charges.
7. Teck has not satisfied conditions precedent to bringing its claims as it has not paid the demurrage charges.
8. Teck has no standing to assert its claim as it has not been damaged.

Dated: September 14, 2009

Respectfully submitted,

By: /s/James D. Helenhouse

James D. Helenhouse
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 920
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RAILWAY COMPANY*

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2009, I filed with the Clerk of the United States District Court for the Northern District of Ohio, Eastern Division, using the ECF system, the foregoing **PLAINTIFF WHEELING & LAKE ERIE RAILWAY COMPANY'S RESPONSE TO TECK COMINCO METALS LTD.'S AFFIRMATIVE DEFENSES AND COUNTERCLAIM**, with ECF e-mail notification upon the following ECF-registered participants:

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s/James D. Helenhouse

APPENDIX 4

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Wheeling & Lake Erie Railway Co.,)	CASE NO.: 5:09CV1184
)	
)	
Plaintiff,)	JUDGE JOHN ADAMS
)	
v.)	<u>ORDER</u>
)	
Teck Cominco Metals, Ltd.,)	(Resolves Doc. 26)
)	
)	
Defendant.)	

This matter appears before the Court on a motion to refer this matter to the Surface Transportation Board ("STB") filed by Defendant, Teck Cominco Metals, Ltd. ("Teck"). Plaintiff, Wheeling & Lake Erie Railway Co. ("Wheeling"), has responded in opposition to the motion. The motion is GRANTED.

The focal point of the motion is the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency. When the doctrine applies, court proceedings are stayed so that the agency may bring its special competence to bear on the issue. Unfortunately, no fixed formula exists for applying the doctrine. Rather, in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Those reasons, broadly speaking, are the desire for uniformity in adjudication and the belief that the decisionmaker with the most expertise and broadest perspective regarding a statutory or regulatory scheme will be most likely to resolve the issue correctly.

U.S. v. Any and All Radio Station Transmission Equip., 204 F.3d 658, 664 (6th Cir. 2000) (citations and quotations omitted). "Primary jurisdiction is appropriate if the case

involves ‘technical or policy considerations which are beyond the court’s ordinary competence and within the agency’s particular field of expertise.’” *St. Clair v. Kroger Co.*, 581 F.Supp.2d 896, 900 (N.D.Ohio 2008) (quoting *MCI v. AT&T*, 496 F.2d 214, 220 (3d Cir.1974)).

In its counterclaim, Teck seeks a determination that Wheeling’s attempted assessment of demurrage charges was an unreasonable practice in violation of 49 U.S.C. § 10702. Similarly, in its answer, Tech alleges that collection of those charges is barred by estoppel, waiver, and laches. In opposition to the pending motion, Wheeling asserts that Teck’s unreasonable practice claim is nothing more than a “repackaging” of its equitable defenses. The Court disagrees.

The Court has found no precedent to suggest that a set of facts cannot support both equitable defenses and a claim of an unreasonable practice. Furthermore, contrary to the position taken by Wheeling, there is nothing to suggest that resolution of the equitable defenses would resolve the unreasonable practice claim. For example, laches requires a showing of “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it.” *GM Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 421 (6th Cir. 2006). A finding that Wheeling was diligent in collecting the demurrage charges would defeat the laches defense. However, there is nothing to suggest that such a finding would cause the collection of those charges to be deemed a reasonable practice. Simply stated, the elements of the equitable defenses at issue do not squarely line up with an analysis regarding unreasonable practices.

The Court accepts Wheeling’s argument that this Court could resolve the equitable defenses. There is no doubt that administrative expertise is not necessary to

resolve claims of estoppel, waiver, and laches. However, the resolution of the counterclaim would require this Court to make a determination of whether Wheeling's practice of collecting demurrage charges, under the facts presented, is an unreasonable practice. Such a determination is unreasonable is squarely within the expertise of the STB.

Numerous courts have referred challenges to the reasonableness of demurrage charges to the STB. *See R.R. Salvage & Restoration Inc., Petition for Declaratory Order, Reasonableness of Demurrage Charges*, STB 42102, 2007 WL 4466695; *see also, e.g., Illinois Central R.R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 815-16 (7th Cir. 2003) (noting that district court had referred to STB questions whether railroad's demurrage rate was unreasonable, whether method by which railroad calculated charges was unreasonable); *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 560 (3d Cir. 1997) (noting that district court had stayed proceedings and referred to ICC issue of reasonableness of rail carrier's demurrage charges). This comports with the general practice of referring matters challenging the reasonableness of acts to the appropriate administrative agency. *U.S. v. Haun*, 124 F.3d 745, 752 (6th Cir. 1997) ("We continue to adhere to the belief expressed in *Crain* that in most instances where rates, rules, or practices are attacked as unreasonable or discriminatory, or where the facts call for the deciding tribunal to exercise a degree of expertise or discretion, courts should stay their hand to allow the appropriate administrative agency an opportunity for initial determination.").

Furthermore, the STB's resolution of the counterclaim would materially aid this Court. In the event that the practice is found to be unreasonable, the complaint would

likely be dismissed. In the event that the practice is found to be reasonable, the counterclaim would be dismissed and the Court would be left with solely deciding the merits of the complaint and affirmative defenses.

The Court also believes that uniformity would be accomplished through an STB determination. See *Springfield Terminal Railway Co. v. Fore River Warehousing and Storage Co.*, 2007 WL 2344970 (D.Me. Aug. 15, 2007) (finding that a determination of whether the manner in which demurrage charges are assessed and collected is reasonable implicates “matters of railway national policy reflected in 49 U.S.C. § 10702[.]”). That Court went on to note that “[w]hen, as here, ‘claims require not only legal analysis, but also an informed evaluation of the economics or technology of the regulated industry[.]’ that fact counsels in favor of a primary-jurisdiction referral.” *Id.* (quoting *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 149 F.3d 787, 789 (8th Cir.1998)). Wheeling is correct that its facts are somewhat unique. However, that does not mean that a broader principle could not be established through an STB proceeding resolving the collection of demurrage charges issue presented herein.

Finally, the Court notes that this matter does not appear to present any type of factual dispute. The parties appear to agree upon nearly all of the facts leading up to this lawsuit. As such, the STB would be deciding a purely legal issue that falls squarely within its administrative expertise.

In issuing this ruling, the Court is mindful that a referral will cause delay in this matter. However, the Court is also mindful that for this matter to be fully resolved, the issue of whether Wheeling engaged in an unreasonable practice must be determined. There is little doubt that the STB is better situated to answer that question in a timely

manner, consistent with its prior rulings. As such, referral may take additional time, but it will also make use of the expertise of the STB and assure that the unreasonable practice allegation is resolved in the proper manner.

The motion to refer the matter to the STB is hereby GRANTED. Further proceedings in the within cause are hereby perpetually stayed and the within case is hereby CLOSED, subject to immediate reopening upon written motion of Wheeling or Teck, after the final decision of the STB.

IT IS SO ORDERED.

October 29, 2009

/s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT